

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

CONTINENTAL CASUALTY
COMPANY, *et al.*,

Plaintiffs,

v.

CORUS PHARMA, INC., *et al.*,

Defendants.

Case No. C06-0921RSL

ORDER GRANTING PLAINTIFFS' MOTION
FOR SUMMARY JUDGMENT

This matter comes before the Court on “Plaintiffs Continental Casualty Company and Transcontinental Insurance Company’s Motion for Summary Judgment Pursuant to Federal Rule of Civil Procedure 56” (Dkt. # 33) and “Defendants’ Motion for Summary Judgment” (Dkt. # 40). The parties seek a declaration regarding the insurers’ obligation to defend defendants in a suit brought in King County Superior Court by Chiron Corporation, a competitor of defendant Corus Pharma. In the underlying state court action, Chiron alleged that defendants misappropriated (a) proprietary information related to “the development and testing of inhalable antibiotic compounds” and (b) Chiron’s opportunity to obtain a patent on, and market, the inhalable antibiotic. Decl. of Anthony B. Leuin (filed 10/9/07), Ex. 1 at ¶¶ 1-2 (hereinafter “Chiron Complaint”).

Summary judgment is appropriate when, viewing the facts in the light most favorable to the nonmoving party, there is no genuine issue of material fact which would preclude the entry of judgment as a matter of law. The party seeking summary dismissal of a

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1 claim “bears the initial responsibility of informing the district court of the basis for its motion,
2 and identifying those portions of ‘the pleadings, depositions, answers to interrogatories, and
3 admissions on file, together with the affidavits, if any,’ which it believes demonstrate the absence
4 of a genuine issue of material fact.” Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986) (quoting
5 Fed. R. Civ. P. 56(c)). Once the moving party has satisfied its burden, it is entitled to summary
6 judgment if the non-moving party fails to designate “specific facts showing that there is a genuine
7 issue for trial.” Celotex Corp., 477 U.S. at 324. In the context of this insurance coverage
8 dispute, the relevant facts are undisputed and the parties agree that summary judgment is
9 appropriate.

10 Having reviewed the memoranda, declarations, and exhibits submitted by the
11 parties and heard oral argument on April 10, 2008, the Court finds as follows:

12 Although Continental and/or Transcontinental provided comprehensive general
13 liability (“CGL”) and umbrella coverage to Corus for successive annual policy periods between
14 February 2001 and February 2007, the only issue in this case is whether Continental had a duty
15 to defend under the 2001-2003 version of the CGL policy.¹ To resolve that issue, the Court
16 compares the allegations of the Chiron complaint with the policy provisions. If the complaint
17 alleges facts which could, if proven, impose liability upon the insured that falls within the
18 policy’s coverage, the duty to defend Corus and its executives in the underlying action is
19 triggered. E-Z Loader Boat Trailers, Inc. v. Travelers Indem. Co., 106 Wn.2d 901, 908 (1986);
20 McMahan & Baker, Inc. v. Continental Casualty Company (CNA), 68 Wn. App. 573, 580
21 (1993). The complaint must be liberally construed and the insurer will be required to defend if
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23 ¹ At oral argument, defendants suggested for the first time that Chiron’s complaint may have
24 triggered the duty to defend under two of the umbrella policies issued by plaintiffs. Despite the fact that
25 plaintiffs’ motion for summary judgment clearly sought a declaration regarding their defense obligations
26 under all of the policies at issue, defendants did not rely on the umbrella policies in their opposition and
cannot do so for the first time at oral argument.

1 the claim is potentially within the policy's coverage. Bosley v. American Motorists Ins. Co., 66
2 Wn. App. 698, 701 (1992).

3 Defendants argue that Chiron's complaint alleges "personal and advertising
4 injuries" covered by Continental's policy. "Personal and advertising injury" is defined in the
5 policy to include injuries arising out of (1) the misappropriation of advertising ideas, (2) the
6 misappropriation of style of doing business, and (3) infringement of copyright, title or slogan.
7 Decl. of Anthony B. Leuin (filed 10/9/07), Ex 2 at CP0094. As defendants point out, the policy
8 does not require that the "advertising injury" be committed in the course of advertising Corus'
9 goods, products or services: the offense merely had to arise "out of [Corus'] business." Decl. of
10 Anthony B. Leuin (filed 10/9/07), Ex 2 at CP0067. The Court need not, therefore, concern itself
11 with whether Corus was involved in an advertising activity or whether there was a causal
12 connection between such activity and Chiron's alleged injuries. See, e.g., Sentex Sys., Inc. v.
13 Hartford Accident & Indem. Co., 93 F.3d 578, 580 (9th Cir. 1996). Nevertheless, Chiron's
14 complaint, liberally construed, must seek to hold defendants liable for one of the three identified
15 "advertising injuries" in order to give rise to the potential for coverage. See Novell, Inc. v. Fed.
16 Ins. Co., 141 F.3d 983, 986 (10th Cir. 1998) (court first considers whether the underlying
17 complaint alleged a predicate offense before examining whether there was a causal connection
18 between the alleged injuries and the insured's advertising activities).

19 Defendants argue that Chiron's claims are based not only on the misappropriation
20 of technical data and know-how regarding inhalable antibiotics, but also on the theft of trade
21 secrets related to funding sources, potential investors, clinicians, test study sites, and marketing
22 knowledge/techniques specific to the cystic fibrosis community. Defendants' Motion (Dkt. # 40)
23 at 8. Unfortunately for defendants, this characterization of Chiron's complaint rests solely on the
24 declaration of Bruce Montgomery, not on the allegations of the complaint itself. In the
25 complaint, Chiron narrowly defines the "proprietary information" that was allegedly stolen as
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1 relating to “the development and testing of inhalable antibiotic compounds.” Chiron’s Complaint
2 at ¶ 2.² None of Chiron’s claims is based on the misappropriation of funding sources, customer
3 lists, or marketing techniques. To the extent the complaint contains any allegations regarding
4 defendants’ efforts to commercialize an inhalable antibiotic, they are offered to support Chiron’s
5 claim that defendants misappropriated development and testing data and do not state a separate
6 wrong for which defendants could be independently liable. For example, Chiron alleges that in
7 December 2000, less than two months after leaving Chiron’s employ, defendant Montgomery
8 filed and pursued a provisional patent application directed to an inhalable formulation of
9 aztreonam, relying in part on a three-month clinical study. Chiron’s Complaint at ¶¶ 44-45. The
10 point of this allegation is that the development and testing information on which the patent
11 application relied had to have been generated while Montgomery was employed by Chiron,
12 thereby supporting Chiron’s claim of misappropriation. Similarly, allegations regarding
13 defendants’ exploitation of their inhalable antibiotic (see Chiron’s Complaint at ¶¶ 52-58) show
14 the damage caused by defendants’ misappropriation of the development and testing information
15 and support Chiron’s claim of equitable ownership over the ‘249 patent: there is no allegation
16 that defendants stole proprietary marketing or customer information.

17 Defendants’ attempts to incorporate the testimony of Bruce Montgomery and the
18 terms of the Employment Agreement into the underlying complaint are unavailing. The general
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20 ² This narrow use of the term “proprietary information” is repeated throughout the complaint.
21 Read as a whole, the complaint makes clear that Chiron is asserting an ownership interest in technical
22 data and information regarding the new inhalable antibiotic and that defendants’ theft of that information
23 is the basis for their liability. See Chiron’s Complaint at ¶ 26 (“Since it began developing PA-1806 in the
24 1990’s, PathoGenesis [Chiron’s predecessor] has engaged in extensive research and testing of PA-1806
25 and aztreonam and has developed significant data, know-how and technical information relating to the
26 compounds. Among other things, PathoGenesis invested significant time and resources in amassing
information about and testing PA-1806 and aztreonam.”) and ¶ 42 (“Upon information and belief, the
Individual Defendants unlawfully used proprietary information relating to PathoGenesis’ development of
PA-1806 and testing of aztreonam and disclosed such proprietary information to third parties.”).

1 rule is that the duty to defend is determined from the face of the underlying complaint. See, e.g.,
2 Truck Ins. Exch. v. Vanport Homes, Inc., 147 Wn.2d 757, 760-61 (2002). Although there are
3 exceptions to this general rule,³ they do not require or justify the consideration of the
4 Montgomery declaration in this case. Upon receipt of Chiron's complaint and defendants' notice
5 of claim, Continental repeatedly asked for any information that would support defendants'
6 contention that a covered claim had been alleged, including any statements by Chiron that
7 indicated that its claims were broader than they appeared on the face of the complaint.
8 Defendants provided no information, in part because they were busy preparing for trial and in
9 part because they believed themselves bound by a protective order that prohibited them from
10 sharing information with their insurer. Continental therefore denied coverage based solely on the
11 information available to it at the time, namely the allegations of Chiron's complaint. Through the
12 Declaration of Bruce Montgomery, defendants now seek to summarize the course of the
13 underlying litigation and explain what Chiron's complaint really means. The best evidence of
14 Chiron's claims, however, is its complaint and/or subsequent documents filed in the underlying
15 litigation. Defendants have not overcome plaintiffs' objections to the declaration of Mr.
16 Montgomery or otherwise shown that his declaration regarding the content of Chiron's complaint
17 is admissible under Fed. R. Ev. 1004 or the hearsay rules. Defendant Montgomery's testimony
18 regarding his understanding of Chiron's claims (paragraphs 12-20 and 24-25 of the declaration)
19 has not, therefore, been considered.⁴
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21 ³ If the complaint is ambiguous or if there are conflicting facts readily available to the insurer, the
22 insurer may consider evidence outside the complaint for the purpose of triggering coverage. E-Z Loader,
23 106 Wn.2d at 908.

24 ⁴ In addition, it would be unfair to allow defendants to withhold from plaintiffs relevant
25 information regarding the nature of Chiron's claims at the time the coverage decision was made and then,
26 once coverage litigation was initiated, to rely on that information to argue that Chiron's claims were
broader than they appeared.

1 Defendants also rely on the terms of the Employment Agreement attached to
2 Chiron's complaint to argue that Chiron has asserted claims based on the misappropriation of
3 advertising-related materials. While it is true that the Employment Agreement defines
4 "Proprietary Information" to include marketing materials and customer lists, the complaint itself
5 uses the phrase without capitals and provides its own, more narrow, definition. The Employment
6 Agreement is attached to the complaint to identify the source of the contractual obligation
7 breached by the individual defendants: its defined terms are not incorporated into the complaint
8 and should not be used to alter or expand the allegations contained therein.

9 For all of the foregoing reasons, the Court finds that Chiron alleged various causes
10 of action arising from defendants' unlawful taking of information, data, and know-how belonging
11 to Chiron's predecessor in connection with the testing and development of an inhalable
12 antibiotic. The next issue, then, is whether the wrong asserted is potentially covered by
13 Continental's policy. Under the law of Washington:

14 [I]nsurance policies are construed as contracts. An insurance policy is construed as
15 a whole, with the policy being given a fair, reasonable, and sensible construction as
16 would be given to the contract by the average person purchasing insurance. If the
17 language is clear and unambiguous, the court must enforce it as written and may
18 not modify it or create ambiguity where none exists. If the clause is ambiguous,
19 however, extrinsic evidence of intent of the parties may be relied upon to resolve
20 the ambiguity. Any ambiguities remaining after examining applicable extrinsic
evidence are resolved against the drafter-insurer and in favor of the insured. A
clause is ambiguous when, on its face, it is fairly susceptible to two different
interpretations, both of which are reasonable.

21 Weyerhaeuser Co. v. Commercial Union Ins. Co., 142 Wn.2d 654, 665-66 (2000) (internal
22 quotations and citations omitted).

23 The only coverage at issue in this case is the "personal and advertising injury"
24 coverage. If Chiron's complaint alleges (1) the misappropriation of advertising ideas, (2) the
25 misappropriation of style of doing business, or (3) infringement of copyright, title or slogan, the
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1 duty to defend would be triggered. All three of these provisions have been interpreted by the
 2 courts, and none of them is alleged in the underlying complaint. In Washington, the
 3 “misappropriation of advertising ideas” can be accomplished in a number of ways, but it always
 4 involves the taking of “an idea for soliciting business or an idea about advertising.” Auto Sox
 5 USA, Inc. v. Zurich N. Am., 121 Wn. App. 422, 427 (2004). See also Amazon.com Int’l, Inc. v.
 6 Am. Dynasty Surplus Lines Ins. Co., 120 Wn. App. 610, 616 (2004). Through the underlying
 7 complaint, Chiron sought to impose liability on defendants for the unlawful taking and
 8 exploitation of research data, not marketing or advertising ideas. Nor did Chiron allege that
 9 defendants had stolen its “style of doing business.” That phrase has “routinely been
 10 characterized as referring to a company’s comprehensive manner of operating its business.”
 11 Green Machine Corp. v. Zurich-Am. Ins. Group, 313 F.3d 837, 840 (3rd Cir. 2002) (internal
 12 quotation marks omitted).⁵ Defendants allegedly stole confidential information regarding the
 13 development and testing of a new product: at its broadest, the complaint can be read to assert a
 14 claim that defendants deprived Chiron of a patent to which it was entitled. Chiron does not
 15 equate this one product with its business or otherwise attempt to hold defendants liable for
 16 misappropriating the manner in which Chiron carries out its business or trade.

17 As to the third predicate offense asserted by defendants, they argue that Chiron’s
 18 alleged loss of the opportunity to patent an inhalable antibiotic is really a claim for “infringement
 19 of copyright, title or slogan.” Defendants’ theory is that, because a patent is property, the alleged
 20 loss of the ‘249 patent is an infringement of legal title. Washington law does not support this
 21 claim, however. The courts have held that the words “copyright,” “title,” and “slogan,” as used
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23 ⁵ Defendants prefer a more cumbersome interpretation of “misappropriation of style of doing
 24 business,” namely the unfair taking for one’s own use the manner in which another performs or carries
 25 out its regular occupation or trade. Opposition at 11. Even if the Court were to adopt this formulation,
 26 it is substantially similar to the interpretation used by the Third Circuit and would not affect the outcome
 of this case.

1 in a “personal and advertising injury” policy, are unambiguous, well-defined, legal categories
 2 related to literary and artistic works. Auto Sox, 121 Wn. App. at 429. “Title,” in this context,
 3 refers to a name, not the ownership of real property. Courts have specifically found that the
 4 phrase “infringement of copyright, title, or slogan” does not include claims of patent infringement
 5 because such a claim is legally distinct and does not fall naturally into the policy language. Id.

6 In apparent recognition of the fact that the case law is against them, defendants
 7 argue that none of the above-cited cases is persuasive, much less precedential, because the policy
 8 at issue here does not require that the misappropriation or infringement arise out of Corus’
 9 advertising activities. Given this purported lack of case law, defendants maintain that the
 10 insurers should have given their insureds the benefit of the doubt and provided a defense.
 11 Defendants rely on dicta in Woo v. Fireman’s Fund Ins. Co., 161 Wn.2d 43, 60 (2007), that
 12 could be interpreted broadly enough to trigger the duty to defend whenever new policy language
 13 is at issue or the specific facts surrounding a claim have not yet been litigated. The Court doubts
 14 that the Supreme Court intended to revolutionize Washington insurance law, however, and
 15 instead views Woo as an application of well-settled principles with a warning against relying on
 16 the advice of counsel in close cases. Other courts which have considered duty of defend cases
 17 since Woo seem to agree: other than substituting the word “conceivably” for its synonym
 18 “potentially,” the analysis remains unchanged.⁶ The key point, as stated by the majority in Woo,
 19 is that an insurer may not rely on an equivocal interpretation of case law to deny coverage:
 20 where there is a doubt about whether the allegations of the complaint could, if proven, give rise
 21 to a covered liability, the insured is entitled to a defense.

22 Whether the Supreme Court intended Woo to work a sea change or not, the Court
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24 ⁶ See Goodstein v. Continental Cas. Co., 509 F.3d 1042 (9th Cir. 2007); Trinity Universal Ins.
 25 Co. v. Animal Pharm., Inc., 2008 WL 958202 (E.D. Wash. April 8, 2008); Weyerhaeuser Co. v.
 26 Fireman’s Fund Ins. Co., 2008 WL 53121 (W.D. Wash. January 2, 2008); Allstate Ins. Co. v. Namini,
 2007 WL 4246181 (W.D. Wash. November 28, 2008).

1 finds that plaintiffs were entitled to rely on the unequivocal cases interpreting “misappropriation
2 of advertising idea,” “misappropriation of style of doing business,” and “infringement of
3 copyright, title or slogan.” Regardless of whether the policy requires conduct arising out of the
4 insured’s advertising activities or simply out of its general business operations, the first issue
5 under the “personal and advertising injury” coverage is whether an advertising injury has been
6 alleged. The three types of advertising injury set forth in Continental’s policy are the same ones
7 that have been interpreted by courts all over the nation: this authority is not equivocal and it
8 leads to the conclusion that there was no advertising injury in this case. The policy distinctions
9 defendants seek to draw are legally insignificant, and the “undetermined rule of law” doctrine set
10 forth in Woo does not come into play.

11 Chiron’s complaint does not allege any cause of action which, if proven, could give
12 rise to a liability covered by Continental’s insurance policy. Having determined that the
13 complaint did not trigger Continental’s duty to defend, the Court need not determine whether the
14 exclusion for claims “arising out of a breach of contract” applies or whether Continental was
15 prejudiced by the insured’s late notice of the claim.

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17 Plaintiffs’ motion for summary judgment is GRANTED and defendants’ motion for
18 summary judgment is DENIED.

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20 Dated this 21st day of April, 2008.

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23 Robert S. Lasnik

24 United States District Judge